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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. KEVIN LANELL WARD, Defendant and Appellant.	B143188 (Super. Ct. No. TA051413)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rose Hom, Judge. Affirmed.

Peter Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Kenneth C. Byrne, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

The trial court sentenced appellant, Kevin Lanell Ward, to 50 years to life after the jury found him guilty of deliberately murdering his girlfriend while personally and intentionally discharging a firearm. He claims the trial court committed constitutional error in admitting statements he made to a deputy sheriff in the absence of *Miranda* warnings while incarcerated. He also claims he was denied due process and the right to a jury trial from the admission of evidence of uncharged acts of domestic violence and by the court's instruction regarding permissible uses of this propensity evidence. In addition, appellant claims the court's instructions impermissibly interfered with the jury's power of nullification and asserts it was prejudicial error to deny his motion for new trial based on juror misconduct. Finally, appellant argues the statute imposing a mandatory 25-years-to-life gun use enhancement is cruel and unusual punishment, violates the separation of powers doctrine, and is unconstitutional on its face. We find no prejudicial error. Accordingly, we affirm.

FACTS AND PROCEEDINGS BELOW

Talisha Durr had been dating appellant Kevin Lanell Ward for five or six months when she decided to break off the relationship. She was tired of his physical abuse. Appellant was jealous of her continuing friendship with her son's father, "Little Ronnie."

In June 1998 appellant, Talisha, Talisha's four-year-old son, Ke'Shawn, Talisha's 15-year-old cousin, Kiana Jordan, and Talisha's 18-year-old niece, Ma-Nese Hobson, were all visiting a relative in the San Fernando Valley. Ma-Nese and Kiana heard a banging sound emanating from the bathroom. They went to the bathroom and opened the door. They saw appellant with his hands around Talisha's neck choking her. Ma-Nese heard appellant tell Talisha he would kill her if she tried to leave him. Talisha told her cousin and niece to take her son away so he would not see the violence.

Appellant and Talisha were still arguing 15 to 20 minutes later outside the residence. Appellant wanted Talisha to accompany him to the store. Ma-Nese watched as appellant shoved Talisha down a set of stairs and into the mailbox. She received a scratch or bruise in the fall. While pushing her appellant told Talisha, "[y]ou better not leave me." Ma-Nese also heard him say "[I]f you don't come to the store with me, you won't find your way back. You won't find your way back to your house."

Ma-Nese said Talisha complained about appellant because he "keeps putting his hands on her."

A month later in July 1998, this same group of people congregated at Talisha's mother's house in Los Angeles. Talisha and appellant had often stayed at Talisha's mother's home. In the afternoon of July 15th four-year-old Ke'Shawn told appellant his mother was on the phone with "Little Ronnie." Appellant got angry and demanded someone drive him home. Talisha drove appellant home around 4:30 p.m. The ride to his home in Watts usually takes between 15 to 20 minutes. However, Talisha did not return home until 8:00 p.m. She came into the house very upset. She told everyone there if appellant called they should say she was not at home. Talisha later told her cousin Kiana appellant had beaten her up "in front of everybody" and no one had come to her aid. According to Kiana, Talisha had a scrape on her cheek where appellant had hit her.

Appellant called approximately 30 minutes after Talisha arrived home. Surrounded by her family members, she answered the phone in the master bedroom using the speaker. Ma-Nese told appellant Talisha was not home. Appellant called again approximately 15 minutes later. Talisha again answered the phone using the speaker. Appellant told Talisha he was sorry and "wouldn't do that again." Talisha reminded appellant he had made and broken similar promises in the past. She told him she was breaking up with him because she was tired of his physical abuse. Appellant became angry and challenged Talisha to break up with him face-to-face. Talisha told

appellant she was not that crazy. Appellant responded, "Well, Okay. Then you know what I'm getting ready to do." He told Talisha she was "going to regret it" and threatened to kill himself or someone else. Appellant told Talisha to take him off the speakerphone because he heard laughing when he asked her to help him cash his check. Appellant was upset she was making fun of him in front of her relatives. As Talisha hung up the phone she warned appellant not to come to her house, her mother's house or her aunt's house.

Kiana and Ma-Nese left to walk to the corner store. They left the front security gates open. Talisha's mother went into the bathroom to take a shower. Talisha stayed in the master bedroom with her son Ke'Shawn who was watching cartoons on the television.

From the shower Talisha's mother heard a bang, a pause and then a series of gunshots. She grabbed a towel and went into the bedroom. She asked Ke'Shawn what happened. Ke'Shawn said, "Kevin shot my momma." She then found Talisha lying on the floor on the other side of the bed.

Talisha sustained 12 gunshot wounds from a .357 caliber revolver. Five of the gunshot wounds to her head were potentially fatal. A gunshot to her left temple was fired from such close range it left stippling marks on her skin.

Talisha's mother's next-door neighbor, Morris McCoy, testified he came home around 8:00 p.m. on July 15, 1998. He parked his rental car at the curb and walked up the driveway to his house. He heard his neighbor's door slam, looked up and saw appellant run off her porch and into the street. Mr. McCoy recognized appellant because he had seen him before with Talisha at her mother's home. Mr. McCoy also recalled speaking with appellant on two prior occasions. Appellant saw Mr. McCoy, turned, and ran toward him. Mr. McCoy thought appellant had some type of weapon in his hand. Appellant said to Mr. McCoy, "All I want is your keys." Mr. McCoy dropped his car keys on the hood of a nearby car. Appellant asked which car was McCoy's and he pointed it out. Appellant got into the car and drove away.

Mr. McCoy later identified appellant in a lineup at the county jail.

Sheriff deputies arrived at the murder scene around 9:00 p.m. The witnesses were taken to the station and individually questioned. When Deputy Sheriff Blanche Octave asked four-year-old Ke'Shawn what happened, he told her, "Kevin shot my momma. He put a gun to her head and he shot her, and then he ran out of the house."

Appellant called Talisha's mother a few weeks after Talisha's death. He told her he was sorry. He said he loved Talisha but he "couldn't let her go."

Appellant was arrested a few weeks later and taken to the inmate reception area. Appellant starting yelling for help while in a holding cell. Two deputy sheriffs approached and asked appellant what was the matter. Appellant replied, "I need to see a psyche. I just killed my girlfriend. They say I used a gun." Appellant said he was depressed and asked to see a psychiatrist. These two deputies, Petersen and Marckstadt, took appellant out of the cell and placed him in another. Hours later he again started yelling for help. Sheriff Deputy Corwin approached appellant and asked what was the matter. Appellant repeated, "I killed my girlfriend and they say I used a gun." Appellant told the deputy he felt suicidal and asked for psychiatric help. The deputy prepared the paperwork required when an inmate threatens suicide. Deputy Corwin directed Deputy Christopher Waladis to escort appellant to the Twin Towers jail facility where appellant could be evaluated by the psychiatric staff.

While walking over to the Twin Towers Deputy Waladis asked appellant why he felt like killing himself. Appellant replied he felt guilty about killing his girlfriend. He explained his girlfriend broke up with him over the speakerphone. He said her relatives listened in on the conversation and "disrespected him" which made him angry. He went to a friend's house where he retrieved a Desert Eagle .357 caliber handgun, approximating the size of a rifle. Someone drove him to his girlfriend's house. After he watched his girlfriend's relatives leave the residence he entered the house and went into the master bedroom. His girlfriend had a surprised look on her face when he entered. Appellant said, "Yeah, I'm here," and shot her six times in the

chest and twice in the head. When he left the house he saw the neighbor drive up. He carjacked his car and left. He was arrested a week later when he went to pick up his paycheck.

At trial Deputy Waladis admitted he had additionally asked appellant how it felt to kill someone and whether appellant was a gang member.

Appellant presented no affirmative defense at trial. However, through argument and questioning on cross-examination, appellant sought to show he was guilty of only voluntary manslaughter based on a heat of passion theory. Defense counsel argued appellant killed Talisha in the throes of rage caused by the violent and volatile history of their relationship, his jealousy of "Little Ronnie," and the fact Talisha's relatives had laughed as she broke up with him. Counsel argued the shooting occurred within 15 to 20 minutes of their last telephone call, the length of time it takes to drive from his house to Talisha's mother's house. Counsel pointed out the number of shots fired, and appellant's lack of a getaway plan, suggested a lack of deliberation and premeditation.

An information charged appellant with one count of murder[1] and one count of carjacking.[2] The information included numerous firearm use allegations. The information further alleged appellant had suffered one prior serious or violent felony conviction within the meaning of the Three Strikes law.[3]

The jury found appellant guilty of murder and carjacking. The jury found the murder to be in the first degree. Regarding the murder count, the jury further found appellant had personally discharged a firearm causing great bodily injury or death,[4]

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[1] Penal Code section 187, subdivision (a). All further statutory references are to the Penal Code unless otherwise noted.

[2] Section 215, subdivision (a).

[3] Section 1170.12, subdivisions (a) through (d), 667, subdivisions (b) through (i).

[4] Section 12022.53, subdivision (d).

had personally and intentionally discharged a firearm,[5] and had personally used a firearm.[6]

The trial court sentenced appellant to 50 years to life in state prison. This appeal followed.

DISCUSSION

I. ERROR IN ADMITTING APPELLANT'S UNMIRANDIZED STATEMENTS TO DEPUTY WALADIS WAS HARMLESS BEYOND A REASONABLE DOUBT.

Prior to trial the court held separate hearings to determine the admissibility of appellant's statements to the various deputies.

According to the testimony presented at the evidentiary hearing, Deputies Marckstadt and Peterson approached appellant in the group cell because he was yelling for help. Deputy Marckstadt testified, "[i]f an inmate tells me he needs help, it's definitely warranted to find out what he needs help with, another inmate after him in jail. Reason being, I need to make sure if another inmate is after him, I can house him in a separate location." In this instance the deputy testified he asked appellant, "What can I help you with?" Appellant replied, "I need to see a psyche. I just killed my girlfriend. They say I used a gun." The deputies took appellant out of the cell and into another while they checked on information concerning appellant's case.

Hours later appellant again started yelling for a deputy. Deputy Corwin approached and asked appellant "what the problem was." Appellant replied he felt like killing himself, that he felt suicidal. Deputy Corwin testified in these circumstances he is required to find out why an inmate feels suicidal. Appellant told Deputy Corwin he was depressed because he had just killed his girlfriend. Deputy

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[5] Section 12022.53, subdivision (c).

[6] Section 12022.5, subdivision (a)(1).

Corwin testified, "[a]t that time I keyed open the gate, pulled him out, did the appropriate paperwork and sent him on his way." Deputy Corwin described the paperwork which is required for a referral to a jail psychiatrist. "It is just a one-page slip for medical staff to look at. And it is kind of like a mental observation form. They just want a brief statement of what this guy's problem is, why he feels the way he feels. Why he feels, you know, suicidal or what have you." The deputy explained the medical staff require some preliminary information on inmates claming to be suicidal. The deputy cited examples of such preliminary information as, "Did he just get beat up? Are the inmates scaring him? Did the family hang up on the phone with him and scold him because he was in custody or whatever? So they could have something to go on."

At the conclusion of this particular hearing the trial court found appellant's statements were not elicited by improper interrogation and thus were admissible as spontaneous declarations. Accordingly, the court ruled Deputies Peterson, Marckstadt and Corwin could testify to appellant's statements to them. Appellant does not challenge the propriety of this particular ruling.

The court held a separate evidentiary hearing regarding appellant's statements to Deputy Waladis. Deputy Waladis testified Deputy Corwin handed him the paperwork, told him appellant was suicidal, and directed him to escort appellant to the Twin Towers jail for evaluation by a psychiatrist. While walking over from men's central jail Deputy Waladis asked appellant why he wanted to kill himself. In response, appellant gave Deputy Waladis a detailed account of the events leading up to Talisha's murder. Specifically, appellant stated he became angry when Talisha broke up with him over the phone because he believed her relatives were making fun of him. Appellant said he went to a friend's house, retrieved a gun and went to Talisha's house. After he saw Talisha's relatives leave the house he entered and shot Talisha several times in the chest and head.

At the Evidence Code section 402 hearing Deputy Waladis claimed he only asked the single question. However, at trial he admitted he also asked appellant how it felt to kill someone and also whether appellant belonged to a gang. Deputy Waladis claimed Deputy Corwin told him no other information about appellant, and that he did not personally know any specific information about appellant. He further claimed he had not read the medical referral slip prepared by Deputy Corwin explaining appellant was depressed and suicidal because he had killed his girlfriend.

At the conclusion of the hearing the trial court ruled appellant's statements were admissible as spontaneous statements. The court stated, "I do find it is admissible. It is a spontaneous statement. Miranda rights do not apply at this point. [¶] Even though he is represented by counsel because counsel was appointed at a prior date . . . his purpose of taking the defendant over to Twin Towers was related to his being suicidal. I think it is an understandable question, 'Why do you want to commit suicide?' after that."

Appellant argues the court's ruling violated his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel and constitutes reversible error.

"Under the familiar requirements of *Miranda*, designed to assure protection of the federal Constitution's Fifth Amendment privilege against self-incrimination under 'inherently coercive' circumstances, a suspect may not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel in the event the suspect is indigent. [Citations.]"[7]

For *Miranda* analysis "interrogation" must reflect "a measure of compulsion above and beyond that inherent in custody itself."[8] Interrogation includes not only

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[7] *People v. Sims* (1993) 5 Cal.4th 405, 440.

[8] *Rhode Island v. Innis* (1980) 446 U.S. 291, 300.

express questioning, but also its "functional equivalent."[9] The functional equivalent of interrogation includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. . . ."[10] The focus of this definition is on the perceptions of the suspect, rather than the intent of the police.[11] Whether questioning constitutes interrogation is decided by objective factors.[12] Although police are not held accountable for the unforeseeable results of their words or actions, their intent is relevant in determining, whether because of the circumstances or the particular defendant, they *should have known* their words or actions were reasonably likely to elicit an incriminating response.[13]

Normally questions incident to arrest or custody, such as name, birth date, address and the like, do not amount to interrogation. Police officers typically have no reason to believe a suspect will incriminate himself by answering such questions.[14] However, when a police officer has reason to know a suspect's answer may incriminate him even routine questioning may amount to interrogation.[15]

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[9] *Rhode Island v. Innis, supra*, 446 U.S. 291, 300-301.

[10] *Rhode Island v. Innis, supra*, 446 U.S. 291, 301.

[11] *Rhode Island v. Innis, supra*, 446 U.S. 291, 301.

[12] *Rhode Island v. Innis, supra*, 446 U.S. 291, 301.

[13] *Rhode Island v. Innis, supra*, 446 U.S. 291, 301-302.

[14] See, e.g., *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 598-600; *United States v. Perez* (9th Cir. 1985) 776 F.2d 797, 799 ["Routine gathering of background biographical data does not constitute interrogation sufficient to trigger constitutional protections."].

[15] See, e.g., *United States v. Henley* (9th Cir. 1993) 984 F.2d 1040, 1042-1043 [where police knew the car was used in a bank robbery their question whether the defendant would consent to a search of his car, and their use of his admission he owned the car, constituted "interrogation" within the meaning of *Miranda*]; see also, *United States v. Gonzales-Sandoval* (9th Cir. 1990) 894 F.2d 1043, 1046-1047 [asking a person his place of birth assumes an entirely different character when an I.N.S. agent asks it of a person he suspects is an illegal alien].

In the present case there is no dispute appellant was in custody at all relevant times. It is also undisputed none of the deputies provided appellant *Miranda* warnings prior to speaking with him outside the presence of his appointed counsel. Appellant also acknowledges his statements to Deputies Marckstadt, Peterson and Corwin were unforeseeable responses to their legitimate questions related to custody.[16] He thus concedes these initial statements were not the result of improper interrogation.

His focus is instead on Deputy Waladis' questioning of him while walking to the Twin Towers facility for psychiatric evaluation. Although admittedly a difficult question, we believe the trial court reached the wrong conclusion. This deputy's sole function was to escort appellant to the jail psychiatrist. The other deputies already knew appellant wanted to see a psychiatrist, already knew he felt suicidal, and already knew he felt suicidal because he had just killed his girlfriend. Thus, Deputy Corwin had already received from appellant whatever information he needed to prepare the necessary paperwork to refer appellant to the jail psychiatrist. In other words, all relevant questioning having any bearing on appellant's request for help had already occurred. No further information was required for his assigned task. Yet Deputy Waladis asked a suicidal inmate, who was already on his way to see a psychiatrist, why he wanted to kill himself and how it felt to kill someone. Accordingly, Deputy Waladis' questioning served no legitimate purpose incident to either his arrest or custody.[17]

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[16] See, e.g., *People v. Bradford* (1997) 14 Cal.4th 1005, 1026-1027 [while being booked, another person being fingerprinted asked whether he had a traffic ticket or warrant and the defendant answered "murder;" these few offhand remarks were not reasonably likely to elicit the defendant's incriminating response]; *People v. Lewis* (1990) 50 Cal.3d 262, 274-275 [defendant who was handcuffed in a police vehicle initiated a casual conversation with an officer he recognized at the scene. His statements to the officer were not violative of *Miranda* because they were voluntary and not the product of coercion].

[17] See *People v. Sims*, *supra*, 5 Cal.4th 405 443-444 [where the defendant asked about extradition and officer instead responded by talking about the crime, the officer's questions served no legitimate purpose and were instead a technique of

Contrary to the trial court's conclusion, "understandable," or merely idle, curiosity, cannot justify an officer in initiating a conversation with an incarcerated inmate who he knows is so emotionally and/or mentally imbalanced the very purpose for the officer's presence is to assist the inmate in receiving psychiatric care. The fact appellant had initially requested help did not open the door to questioning by this particular officer whose only business was to act as escort.[18]

From appellant's perspective the deputy's question was essentially the functional equivalent of interrogation. When he first asked for help and requested a psychiatrist appellant got no response except to be moved into another cell. It was not until he said he felt suicidal a deputy took some action to permit him to be evaluated by a psychiatrist. Appellant may have been conditioned to expect to have to give information to receive the assistance he sought by the time Deputy Waladis again asked why appellant felt like killing himself. Under these circumstances the officer's questions amounted to a technique of persuasion which was likely to induce appellant to explain still further why he needed the assistance of a psychiatrist. Because Deputy Waladis had no legitimate reason to ask these questions, appellant's responses to those questions should not have been admitted in evidence.

When a statement obtained in violation of *Miranda* is erroneously admitted into evidence, the prejudicial effect of its admission in evidence must be determined under

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persuasion likely to induce the defendant to incriminate himself]; *People v. Peracchi* (2001) 86 Cal.App.4th 353 [where defendant invoked his right to remain silent and stated he did not think he could talk just then, the officer's questions about why the defendant did not want to talk were designed to keep the defendant talking until he made an incriminating response].

[18] See, e.g., *People v. Sims, supra*, 5 Cal.4th at p. 441 [the defendant's sole question regarding the possibility of extradition did not open the door to questioning about the crimes].

the federal *Chapman*[19] standard of whether the error was harmless beyond a reasonable doubt.[20]

Appellant's statements to Deputy Waladis amounted to a confession he had planned and premeditated Talisha's murder. Appellant thus argues these particular statements undermined his defense he had killed in a rash impulse, under a heat of passion, and was thus guilty of only voluntary manslaughter. He claims without this evidence the jury was "free to conclude that [appellant] left his house in a blind rage, already armed, and sped to his girlfriend's house where he shot her upon arrival." Our independent review, however, reveals the record contains substantial evidence, independent of his statements to Deputy Waladis, which showed appellant had in fact planned and premeditated Talisha's murder. In other words, this is not a case where the only evidence proving appellant's intent were those statements admitted in violation of *Miranda*.[21]

Talisha's relatives testified appellant had threatened to kill Talisha if she ever left him. Appellant made this threat more than a month prior to the murder. Appellant threatened to kill Talisha again the day of her murder. When she broke up with him appellant warned Talisha "you know what I'm getting ready to do."

The physical evidence also demonstrates appellant premeditated Talisha's murder. The evidence established appellant armed himself before coming to Talisha's house. Bringing a firearm to confront an unarmed victim is often evidence of planning activity.[22] Appellant then drove, or was driven, the 15 to 20-minute ride to Talisha's

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[19] *Chapman v. California* (1967) 386 U.S. 18, 24.

[20] *Arizona v. Fulminante* (1991) 499 U.S. 279, 306-309; *People v. Sims, supra,* 5 Cal.4th 405, 447.

[21] Compare, *People v. Peracchi, supra*, 86 Cal.App.4th at page 363 [the only direct evidence placing the defendant behind the wheel in a prosecution for reckless driving and evading police was the defendant's statement to the police elicited in violation of *Miranda*].

[22] See, e.g., *People v. Williams* (1995) 40 Cal.App.4th 446, 455; *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1192.

mother's house. As the prosecutor argued to the jury, the driving time alone over this distance was a sufficient cooling off period to negate any claim of a shooting during a heat of passion. The evidence also established appellant did not shoot blindly as if overcome by rage once he arrived inside the house. Instead, he shot once, paused as if contemplating the situation or his next move and then fired a series of shots. All shots hit Talisha in the head and chest area. The one shot to her left temple was close enough to leave stippling marks. This shot alone indicates a deliberate intention to kill.

Given the substantial other evidence of appellant's intent to commit premeditated, deliberate murder, we conclude the erroneous admission of his statements to Deputy Waladis was harmless beyond a reasonable doubt.[23]

II. INADVERTENT JUROR MISCONDUCT DID NOT RESULT IN PREJUDICIAL ERROR WARRANTING A NEW TRIAL.

Originally, appellant had been charged as a second strike defendant based on a conviction for robbery while a juvenile. Prior to trial the court ruled the fact of appellant's prior juvenile conviction could not be used for any purpose, including impeachment. The prosecutor admonished all witnesses not to mention appellant's criminal history. Sometime prior to the jury reaching their verdict, defense counsel and the prosecutor realized appellant's robbery conviction did not qualify as a strike for Three Strikes sentencing purposes without an arming finding.

The prosecutor spoke to some of the jury members after the jury was discharged. One juror remarked he believed it was a "second strike" case. The prosecutor inquired about the source of the juror's belief. The juror said he saw a notation on a calendar notice posted outside the courtroom. The court consulted its

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[23] *Chapman v. California, supra,* 386 U.S. 18, 24.

notes and in fact on March 6, 2000, during jury selection, the calendar notice naming appellant's case contained the comment "2nd strike."

Ultimately the court recalled the jurors and questioned each of them individually. Six jurors and one alternate stated he or she had seen the notice. Several of these persons either knew what the phrase "second strike" meant or at least had heard the phrase "second strike." Every juror stated he or she did not discuss the second strike issue with any other juror or alternate juror. Each juror also stated he or she had not heard any one else discuss the second strike issue in deliberations or otherwise.

Of course, as noted, appellant was not in fact a second strike offender. Although he was originally charged as such, once the parties realized the prior offense did not qualify as a strike the prosecutor moved to strike the allegation in the interest of justice.

Appellant moved for new trial on the ground of juror misconduct for the inadvertent receipt of evidence out of court.[24] The court denied the motion, finding no misconduct and no prejudice.

It is settled law evidence obtained by jurors from sources other than in court is misconduct.[25] That is to say it is misconduct for the jury to receive any information "in connection with the subject-matter of the trial which would be at all likely to influence jurors in the performance of their duty . . . ."[26] This is true whether receipt of the extrajudicial material by the jury was deliberate or inadvertent.[27]

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[24] Section 1181, subdivision (2) provides a defendant may move for new trial "[w]hen the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property."

[25] *People v. Holloway* (1990) 50 Cal.3d 1098, 1108.

[26] *People v. Holloway, supra*, 50 Cal.3d 1098, 1108.

[27] *People v. Holloway, supra*, 50 Cal.3d 1098, 1110.

Juror misconduct raises a rebuttable presumption of prejudice which may be rebutted by proof no prejudice actually resulted.[28] The presumption is rebutted where "the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors was actually biased against the defendant."[29] That is to say, the presumption of prejudice may be rebutted by evidence no prejudice actually occurred, "or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party. [Citation.]"[30]

Appellant argues the information he was a second striker was so inherently prejudicial reversal is required. Appellant correctly points out the erroneous information he was a second striker illustrates the dangers of jurors receiving extraneous information. Although untrue, he could not challenge the information through cross-examination or otherwise. Also, because no one learned of the incident until after the jury's verdict, the jurors were not screened for bias, the trial court could not instruct the jury to disregard the erroneous information, and the court did not have the opportunity to replace potentially affected jurors with alternates.

Nevertheless, we are persuaded no prejudice actually resulted from the receipt of this extrajudicial information. In other words, we find there is no substantial likelihood the vote of one of more jurors was influenced against appellant because he or she saw the phrase "2nd strike" on the calendar notice outside the courtroom door.[31]

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[28] *People v. Pinholster* (1992) 1 Cal.4th 865, 925; *People v. Cooper* (1991) 53 Cal.3d 771, 835.

[29] *In re Hamilton* (1999) 20 Cal.4th 273, 296.

[30] *People v. Loot* (1998) 63 Cal.App.4th 694, 697; see also, *People v. Nesler* (1997) 16 Cal.4th 561, 582 [whether prejudice arose from juror misconduct is a mixed question of law and fact subject to an appellate court's independent determination].

[31] *In re Hamilton, supra*, 20 Cal.4th 273, 296; *People v. Marshall* (1990) 50 Cal.3d 907, 950-951.

Evidence of appellant's guilt and his identity as the perpetrator was overwhelming. Immediately after the incident four-year-old Ke'Shawn told his grandmother "Kevin shot my momma." At the police station he told the deputy, "Kevin shot my momma. He put a gun to her head and he shot her, and then he ran out of the house." In an act tantamount to a confession, appellant called Talisha's mother after her murder to apologize, explaining, "he couldn't let her go." In prison, appellant told Deputy Sheriffs Peterson, Marckstadt and Corwin, "I just killed my girlfriend. They say I used a gun." This unchallenged evidence points inexorably to appellant as Talisha's murderer. In addition, the jury heard evidence at least a month prior to her death appellant threatened to kill Talisha if she ever left him. The evidence also showed after Talisha broke up with him over the telephone appellant said she would regret it and told her "well you know what I have to do." He then armed himself and drove for 15 to 20 minutes until he reached Talisha's house. As noted in the previous section, this evidence was independently sufficient to establish appellant had planned and premeditated Talisha's death.

In the face of this considerable evidence of guilt we conclude there is no reasonable likelihood one or more of the jurors was biased against appellant only after seeing the "2nd strike" notation on the court's calendar notice.

III. ADMISSION OF EVIDENCE OF PRIOR ACTS OF DOMESTIC VIOLENCE AND THE INSTRUCTION REGARDING ITS USE, IF ERROR, WOULD BE HARMLESS IN THIS CASE.

After Evidence Code section 402 hearings, and over appellant's objection, the trial court permitted the prosecutor to introduce evidence of his uncharged acts of domestic violence against Talisha. This included evidence appellant choked Talisha and told her he would kill her if she tried to leave him. It also included evidence appellant pushed Talisha down several steps and into a mailbox while telling her she better come to the store with him or she would not "find her way home." In addition,

the jury heard evidence on the day she died Talisha came home with a scrape on her cheek as a result of appellant beating her up.

The trial court found appellant's statements admissible under Evidence Code section 1101, subdivision (b) as probative on the issues of his motive and intent for the killing.[32] The court also found the evidence of prior acts of domestic violence expressly admissible under Evidence Code section 1109, subdivision (a).[33] Appellant contends admission of the prior acts of domestic violence pursuant to Evidence Code section 1109 was improper and violative of his right to due process and a fair trial.

A. Evidence Code Section 1109 Does Not Violate Due Process.

Since the California Supreme Court's decision in *People v. Falsetta* every Court of Appeal to consider the issue has upheld the constitutionality of Evidence Code section 1109 against claims it violated due process and thus prevented fair

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[32] Subdivision (a) of Evidence Code section 1101 provides evidence of a person's character or trait of character is inadmissible when offered to prove the person's conduct on a specified occasion. Subdivision (b) of this section provides various exceptions to this general rule. It provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than his or her disposition to commit such an act."

[33] Evidence Code section 1109, subdivision (a)(1) provides in relevant part "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

trials.[34] In *Falsetta* the court considered a due process challenge to Evidence Code section 1108, a provision which mirrors section 1109, except it permits the admission of a defendant's past sex crimes for the purpose of showing a propensity to commit those crimes. In rejecting the argument Evidence Code section 1108 offends due process, the *Falsetta* court relied on reasoning articulated in *People v. Fitch*[35] which upheld the validity of section 1108 in the face of a due process challenge. The *Falsetta* court concluded "we think the trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge. As stated in *Fitch*, 'section 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. Such evidence is still subject to exclusion under . . . section 352. (. . . § 1108, subd. (a).) By subjecting evidence of uncharged sexual misconduct to the weighing process of section 352, the Legislature has ensured that such evidence cannot be used where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. (. . . § 352.) This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. [Citation.] With this check upon admission of evidence of uncharged sex offenses in prosecutions for sex crimes, we find that . . . section 1108 does not violate the due process clause.' [Citation.]"[36]

Courts are unanimous in finding the reasoning in *Falsetta* applies equally to due process challenges to section 1109. They reason Evidence Code sections 1108 and

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[34] See e.g., *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1096; *People v. James* (2000) 81 Cal.App.4th 1343, 1353; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1335; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027-1028; *People v. Johnson* (2000) 77 Cal.App.4th 410, 417-420.

[35] *People v. Fitch* (1997) 55 Cal.App.4th 172, 178-185.

[36] *People v. Falsetta* (1999) 21 Cal.4th 903, 917-918 (*Falsetta*).

1109 are companion portions of the same statutory scheme.[37] These courts also note the reasons underlying their enactment are the same.[38] Most importantly, both statutes are subject to the limitations and protections of Evidence Code section 352. As the *Falsetta* court found, Evidence Code section 352 "saves section [1109] from [a] defendant's due process challenge."[39] We agree with our colleagues in these Courts of Appeal and agree *Falsetta's* analysis and holding require us to reject appellant's due process challenge in this case as well.[40]

B. Any Error In Giving CALJIC No. 2.50.02 Was Harmless Beyond A Reasonable Doubt In This Case.

In its charge the trial court instructed the jury with CALJIC No. 2.50.02, as revised in 1999, regarding the permissible use of the evidence of prior domestic

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[37] See, e.g., *People v. Brown, supra,* 77 Cal.App.4th 1324, 1333 ["The language of section 1109 mirrors that of section 1108, and both sections are specifically omitted from section 1101, which generally excludes evidence of prior bad acts to prove a defendant's criminal disposition. . . ."]; *People v. Johnson, supra,* 77 Cal.App.4th 410, 147 ["We shall conclude, by parity of reasoning, the same applies to Evidence Code section 1109, since the two statutes are virtually identical, except that one addresses prior sexual offenses while the other addresses prior domestic violence."].

[38] A bill analysis of section 1109 states "[t]his section is modeled on the recently enacted Evidence Code 1108, which accomplishes the same for evidence of other sexual offenses in sexual offense prosecutions." (Assembly Committee on Public Safety, Analysis of Senate Bill No. 1876 (1995-1996 Regular Session) June 25, 1996, p. 3.) This analysis explains the need for special treatment of evidence of prior domestic violence in prosecutions for domestic violence as follows: "Proponents argue that in domestic violence cases, as in sexual offense cases, special evidentiary rules are justified because of the distinctive issues and difficulties of proof in this area. Specifically, evidence of other acts is important in domestic violence cases because of the typically repetitive nature of domestic violence crimes, and because of the acute difficulties of proof associated with frequently uncooperative victims and third-party witnesses who are often children or neighbors who may fear retaliation from the abuser and do not wish to become involved." (*Id*. at p. 4.)

[39] *Falsetta, supra,* 21 Cal.4th at page 917.

[40] *Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.

abuse.[41] Appellant contends this instruction regarding use of evidence of prior acts of domestic violence permitted the jury to infer he had a disposition to commit acts of domestic violence and further to infer he "did commit" the charged offense if they found he committed the prior uncharged acts of domestic violence. He thus contends instructing the jury with CALJIC No. 2.50.02 allowed the jury to convict him of first degree murder without proof beyond a reasonable doubt he in fact premeditated and planned the murder.[42]

Appellate courts were divided whether jurors were reasonably likely to interpret the pre-1999 version of CALJIC No. 2.50.02 to authorize a conviction of a current crime based merely on proof by a preponderance of the evidence the defendant

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[41] CALJIC No. 2.50.02, as read to the jury in the present case, provides in pertinent part: "Evidence has been introduced for the purpose of showing that the defendant engaged in an offense involving domestic violence on one or more occasion other than that charged in the case. [¶] [¶]

"If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused.

"However, if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offense. The weight and significance, if any, are for you to decide.

"Unless you are otherwise instructed, you must not consider this evidence for any other purpose."

[42] He claims the instruction has no application to the present case and should not have been given in any event. The instruction refers to the "same or similar crimes" and appellant argues the acts of choking, pushing and beating have no similarity to murder. Appellant takes an unduly narrow view of the import of this phrase which likely was intended to refer to all possible permutations of domestic violence, including murder. (See also, concurring opinion of Justice Brown in *Falsetta*, opining Evidence Code section 1108 has no requirement the prior acts be either the same or similar. (*Falsetta, supra*, 21 Cal.4th at p. 926.)

committed the prior crimes.[43] Other courts concluded otherwise.[44] Still other courts concluded the other more general instructions given in the case cured the error in the former propensity instructions.[45]

To address the argument the former instruction confused the jury and lessened the prosecution's burden of proof the CALJIC committee revised the propensity instructions in 1999. CALJIC Nos. 2.50.01, regarding prior sex offenses, and 2.50.02, regarding prior acts of domestic violence, were amended to add the paragraph: "However, if you find [by a preponderance of the evidence] that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove [beyond a reasonable doubt] that [he] committed the charged offense[s]. The weight and significance, if any, are for you to decide."

In *Falsetta* the Supreme Court observed in dictum the revised instruction "adequately sets forth the controlling principles" for the jury's use of other crimes evidence.[46] The court remarked the instruction "contains language appropriate for cases involving the admission of disposition evidence."[47] The court also noted the admonition the jury could not "convict [the] defendant solely in reliance on the evidence that he committed prior sex offenses" will "assure that the defendant will be tried and convicted for his present, not his past, offenses."[48]

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[43] See, e.g., *People v. Vichroy* (1999) 76 Cal.App.4th 92, 98-101; *People v. Orellano* (2000) 79 Cal.App.4th 179, 181; *People v. James*, *supra*, 81 Cal.App.4th 1343, 1362-1363; *People v. Younger* (2000) 84 Cal.App.4th 1360; *People v. Frazier* (2001) 89 Cal.App.4th 30, 35-37.

[44] See, e.g., *People v. Van Winkle* (1999) 75 Cal.App.4th 133; *People v. O'Neal* (2000) 78 Cal.App.4th 1065; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1396-1398; *People v. Regalado* (2000) 78 Cal.App.4th 1056, 1063-1064.

[45] See, e.g., *People v. Escobar*, *supra*, 82 Cal.App.4th 1085, 1101 [former CALJIC No. 2.50.02]; *People v. Jeffries* (2000) 83 Cal.App.4th 15, 22-24 [former CALJIC No. 2.50.01].

[46] *Falsetta, supra*, 21 Cal.4th 903, 924.

[47] *Falsetta, supra*, 21 Cal.4th 903, 922.

[48] *Falsetta, supra*, 21 Cal.4th 903, 923.

In *People v. Brown*[49] the court upheld the 1999 revision of CALJIC 2.50.02 regarding prior acts of domestic violence against a constitutional challenge virtually identical to that made by appellant in this case. The *Brown* court found the instructions "did not allow the jury to infer that he committed the charged crime solely from proof that he committed the prior acts of domestic violence. To the contrary, the instructions expressly provided that 'evidence that the defendant committed prior offenses involving domestic violence is not sufficient by itself to prove that he committed the charged offenses.' . . . The *Falsetta* court specifically noted that an admonishment 'not to convict defendant solely in reliance on the evidence that he committed prior sex offenses,' will help 'assure the defendant will be tried and convicted for his present, not his past offenses.'"[50] The *Brown* court recognized the *Falsetta* court did not review the constitutionality of the 1999 revision. Nevertheless, the *Brown* court believed, "it is improbable that the California Supreme Court would suggest that an instruction 'adequately sets forth the controlling principles' for considering other crimes evidence, and then find that same instruction to be constitutionally defective."[51]

Finding the high court's dictum "highly persuasive," many courts conclude the 1999 revision to the propensity instructions, including those to CALJIC 2.50.02, cured the potential constitutional defect.[52] In *People v. Reliford* Division Four of this District was not so persuaded. It concluded the revision was insufficient to clarify for the jury how to reconcile the lesser standard of proof to establish the inference of propensity with the requirement of finding guilt beyond a reasonable doubt. The Supreme Court

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[49] *People v. Brown, supra,* 77 Cal.App.4th 1324.

[50] *People v. Brown, supra,* 77 Cal.App.4th 1324, 1335.

[51] *People v. Brown, supra,* 77 Cal.App.4th 1324, 1336.

[52] *People v. Hill* (2001) 86 Cal.App.4th 273, 278-279 [CALJIC No. 2.50.01]; *People v. Brown, supra,* 77 Cal.App.4th 1324, 1336 [CALJIC No. 2.50.02].

has since granted review in *Reliford* to hopefully provide definitive guidance in this area.[53]

A due process defect in the use of CALJIC No. 2.50.02 would nevertheless not compel reversal in this case as a matter of law.[54] Here the nonpropensity evidence pointing to appellant's guilt was overwhelming. As previously noted, appellant's identity as Talisha's murderer was conclusively established through his own admissions and through Ke'Shawn's spontaneous statements. This testimony was largely uncontested. Also, as noted, proof he premeditated and deliberated Talisha's murder, rather than acted in a rash impulse, was established through evidence of his prior threats to kill her if she left him, as well as his actions in arming himself, and making the 15 to 20 minute drive to assault his victim. Thus on the facts of this case, we are persuaded any error in the propensity instruction was harmless beyond a reasonable doubt.[55]

IV. APPELLANT CANNOT DEMONSTRATE PREJUDICE FROM THE COURT'S INSTRUCTION ON CALJIC NO. 17.41.1.

The trial court instructed the jury pursuant to CALJIC No. 17.41.1 "the integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions" and they should report to the court any juror who expresses an intent to disregard the law.

Appellant contends this instruction deprived him of his Sixth and Fourteenth Amendment rights to fair trial and unanimous jury verdict and constituted an unwarranted interference with the jury's historic right to nullification. Although

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[53] *People v. Reliford* (B141201), review granted February 13, 2002 (S103084).

[54] See *People v. James, supra,* 81 Cal.App.4th at pages 1360-1363.

[55] *Chapman v. California, supra,* 386 U.S. 18, 24.

appellant made no objection in the trial court, the relevant authority permits this court to consider the contention in the absence of an objection.[56]

However, we need not, and do not, reach the issue whether CALJIC No. 17.41.1. is unconstitutional, a question presently under review before the California Supreme Court.[57]

In this case the error, if any, would have been harmless beyond a reasonable doubt. There was no jury deadlock; no holdout jurors; and no report to the court of any juror refusing to follow the law. In short, there was no indication the court's instruction to the jury with CALJIC No. 17.41.1 affected the verdict.

V. SECTION 12022.53 IS NOT UNCONSTITUTIONAL ON ITS FACE.

The trial court sentenced appellant to 50 years to life: 25 years to life for the murder conviction, plus an additional, consecutive and mandatory 25 years to life term pursuant to section 12022.53, subdivision (d) for having caused Talisha's death by personally and intentionally discharging a firearm. Appellant contends section 12022.53 is unconstitutional on its face.[58] He claims this provision violates the constitutional ban on cruel and unusual punishment, and in addition, violates the

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[56] Section 1259; *People v. Flood* (1998) 18 Cal.4th 470, 482, footnote 7; *People v. Wickersham* (1982) 32 Cal.3d 307, 331-335, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201.

[57] See, e.g., *People v. Linn* (B142261), review granted October 31, 2001 (S100485); *People v. Phillips* (H020377), review granted September 12, 2001 (S099017); *People v. Morgan* (C032328), review granted March 14, 2001 (S094101); *People v. Taylor* (B128957), review granted August 23, 2000 (S088909); *People v. Engleman* (D032699), review granted April 26, 2000 (S086462).

[58] Appellant does not claim the statute is unconstitutional as applied to him.

separation of powers doctrine by eliminating a sentencing court's discretion to strike an allegation or finding of gun use alleged under this section.[59]

Section 12022.53 provides increasing prison terms, characterized by one Court of Appeal as, "a careful gradation by the Legislature of the consequences of gun use in the commission of serious crimes."[60] If a defendant "personally *used* a firearm" section 12022.53 provides for an additional 10-year term under subdivision (b). If a defendant "personally and intentionally *discharged* a firearm," subdivision (c) provides for additional and consecutive punishment of 20 years. Under section 12022.53, subdivision (d) an additional and consecutive term of 25 years is required for a defendant who personally and intentionally discharges a firearm causing death or great bodily injury. This latter subdivision provides in relevant part: "Notwithstanding any other provision of law, any person who is convicted of a felony specified in subdivision (a), . . . and who in the commission of that felony *intentionally and personally discharged* a firearm and proximately caused great bodily injury . . . , or *death*, to any person other than an accomplice, shall be punished by a term of imprisonment of 25 years to life in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony."[61]

This enhancement provision only applies to particularly serious crimes. Section 12022.53, subdivision (a) lists sixteen felonies to which subdivision (d) applies, including murder.[62]

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[59] Section 12022.53, subdivision (h) provides: "Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."

[60] *People v. Martinez* (1999) 76 Cal.App.4th 489, 495.

[61] Italics added.

[62] Section 12022.53 applies to convictions for murder; mayhem; kidnapping; robbery; carjacking; assault with intent to commit a specified felony; assault with a firearm on a peace officer or firefighter; rape; rape or sexual penetration in concert; sodomy; lewd act on a child; oral copulation; sexual penetration; assault by a life

Appellant acknowledges murder is a very serious crime but argues the additional punishment imposed for having used a gun constitutes cruel and unusual punishment when compared with sentences imposed on a defendant who commits a premeditated, deliberate murder by means other than a firearm. He points out punishment is less severe for a defendant who commits premeditated murder by "stabbing, beating, strangling, impaling, bludgeoning, drowning, garroting, axing, or suffocating his victim." He asserts punishment shocks the conscience and is grossly disproportionate to the crime when the choice of weapon, and not the choice of crime, controls the length of a defendant's sentence.

The court in *People v. Perez* rejected a variation of appellant's argument.[63] In declining to find the statute violated due process or equal protection the *Perez* court noted "defendant fails to acknowledge that firearms pose a potentially greater risk to safety than other weapons because of their inherent ability to harm a greater number of victims more rapidly than other weapons. In so doing, he further fails to recognize that an increase in public safety is a legitimate state interest. (*People v. Martinez* (1999) 76 Cal.App.4th 489, 497-498 ['The ease with which a victim of one of the enumerated felonies [in section 12022.53] could be killed or injured if a firearm is involved clearly supports a legislative distinction treating firearm offenses more harshly than the same crimes committed by other means, in order to deter the use of firearms and save lives.']; see also, *People v. Morgan* (1973) 36 Cal.App.3d 444, 449 ['A firearm can inflict deadly wounds on a number of people within a wide area and within a short amount of time . . . . ']; *People v. Aguilar* (1973) 32 Cal.App.3d 478, 486 [harsher penalties for firearms are based on a rational distinction, such as the disadvantage to an unarmed victim, the lethal nature of firearms, and 'the relative speed with which a potential killer armed with a firearm can execute an intent to kill,

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prisoner; assault by a prisoner; holding a hostage by a prisoner; and any felony punishable by death or imprisonment for life.

[63] *People v. Perez* (2001) 86 Cal.App.4th 675.

once it is formed.']"[64] We find the *Perez* court's analysis persuasive and adopt it as our own.

Appellant next argues California is alone in punishing gun use so severely, which in turn demonstrates the punishment is grossly disproportionate to the offense.[65] Several courts have rejected this precise claim, regarding the Three Strikes law, as well as regarding challenges to the gun use enhancements provided in section 12022.53.[66]

In the alternative, appellant argues the statute violates the separation of powers doctrine because by its terms the statute eliminates judicial discretion to strike, stay or reduce the terms of punishment. He points out, unlike the prosecutor who retains discretion whether to charge a particular gun use enhancement, the sentencing court retains no discretion to impose a more lenient sentence because the additional 25 years to life term under section 12022.53, subdivision (d) is mandatory by its own terms and as directed in subdivision (h).

It is true section 12022.53 provides for mandatory additional terms in the designated circumstances. It is also true the Legislature in section 12022.53 has removed a sentencing court's discretion to choose whether or not to impose the enhancement or the level of punishment for gun use in these circumstances.

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[64] *People v. Perez, supra*, 86 Cal.App.4th 675, 678-679.

[65] *Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 [a penalty violates the federal constitution if it is grossly disproportionate to the offense]; *In re Lynch* (1972) 8 Cal.3d 410, 424 [punishment is cruel and unusual if is so disproportionate to the crime for which it is inflicted it shocks the conscience and offends fundamental notions of human dignity].

[66] See, e.g., *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516 ["That California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require "conforming our Penal Code to the 'majority rule' or the least common denominator of penalties nationwide.'"]; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 18 [applying *Martinez's* analysis to a constitutional challenge to section 12022.53].

Nevertheless, the removal of a court's sentencing discretion does not automatically establish a violation of the separation of powers doctrine. The power to define crimes and fix penalties is exclusively in the Legislature. This legislative power includes the power to eliminate a court's sentencing discretion entirely.[67] The judiciary, nevertheless, retains the power to decide whether in a given case the mandated punishment is constitutional as applied to the particular defendant before the court.[68]

Given the judiciary's retained power to declare the punishment unconstitutional in a proper case, we reject appellant's claim the statute is unconstitutional on its face as violative of the separation of powers doctrine.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, J.

We concur:

LILLIE, P.J. PERLUSS, J.

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[67] See, e.g., *People v. Thomas* (1992) 4 Cal.4th 206, 211 [Legislature may eliminate trial courts' discretion under section 1385 to strike punishment in the interests of justice]; *People v. Superior Court (Romero*) (1996) 13 Cal.4th 497, 516 [The judicial power to choose a particular sentencing option may be eliminated by the Legislature and the electorate].

[68] *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 552 [‘’”[S]ubject to the constitutional prohibition against cruel and unusual punishment, the power to define crimes and fix penalties is vested exclusively in the legislative branch.”’” Quoting *People v. Superior Court (Romero), supra,* 13 Cal.4th 497, 516; *People v. Dillon* (1983) 34 Cal.3d 441].